UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 00-CR-20025-BC
Hon. David M. Lawson

THOMAS R. MEIXNER,

Defendant.
_____/

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

The Court is called upon in this case to decide whether and when the defendant's right of privacy in his own home must give way to the government's right to search such premises.

The defendant, Thomas Meixner, is charged in a three-count Indictment with being a felon in possession of firearms and with possessing sawed-off shotguns in violation of 18 U.S.C. § 922(g)(1) and 26 U.S.C. § 5861(d), respectively. The violations were discovered as the result of the entry into the defendant's residence by a Michigan State Police officer acting without a warrant on September 11, 1999. Information obtained from this warrantless entry was conveyed to personnel at the Bureau of Alcohol, Tobacco and Firearms (BATF) who used the information in support of an application for a search warrant. The search warrant was obtained and executed at the defendant's residence on September 16, 1999, at which time the weapons were seized.

The defendant filed a Motion to Suppress Evidence [dkt #9] claiming that the search warrant was tainted by information obtained through the warrantless entry into his residence in violation of his Fourth

Amendment rights. The government responded to the motion asserting that the defendant lacked standing to claim a violation of the Fourth Amendment, and that the entry by the Michigan State Police officer was justified by exigent circumstances.

The motion was referred by this Court's predecessor to the United States Magistrate Judge for a hearing pursuant to 28 U.S.C. § 636(b)(1)(B), which was held on July 19, 2000. Two Michigan State Police officers testified, as did the defendant, his girlfriend, Monica Allor, and three other witnesses. The Magistrate Judge filed a Report and Recommendation on August 10, 2000 concluding that the defendant had standing to bring the motion to suppress, and that the warrantless entry was justified by exigent circumstances.

The defendant filed timely objections to the Report and Recommendation. The government did not object to that portion of the Report and Recommendation adverse to its position on the standing issue.

This Court conducted a *de novo* evidentiary hearing on October 6, 2000, at which time the witnesses again appeared and testified, additional exhibits were received, and the parties presented arguments. At the hearing, the government withdrew its claim that the defendant lacked standing to raise the issues of the illegality of the entry into and search of the defendant's home. Each party has now filed post-hearing memoranda. For the reasons set forth below, the defendant's Motion to Suppress is **GRANTED**.

I.

The defendant, Thomas Meixner, lives with his girlfriend, Monica Allor, in a mobile home located at 670 S. M-18 in Gladwin, Michigan. They have a young child together who lives in the home. Defendant's father lives in a house located on the adjacent parcel of land immediately to the north, at 650

S. M-18.

During the afternoon and evening of September 11, 1999, the defendant's sister, Joyce Ann Jacobs, held a party at the 650 address to celebrate her upcoming wedding. Several people attended, including the defendant and Allor. Beer was served, which both defendant and Allor drank.

The defendant had walked back and forth between the two houses during the afternoon and evening, and went home to stay at approximately 8:30 p.m. Allor came home near that time. Allor and defendant began arguing. Allor used the telephone to call her mother. She also overturned a computer monitor. At one point she dialed the county emergency telephone number, 911, and hung up without speaking. The defendant unplugged the telephone. Allor calmed down, the defendant's argument ended, and Allor got ready for bed.

Two Michigan State Police officers were dispatched to 670 S. M-18 as a result of the 911 hang-up call, which displayed caller identification information. The officers first drove to the address next door where the party was breaking up. When they realized their mistake, they drove to the defendant's residence. The events which ensued were described at the evidentiary hearing as set forth below.

At the outset, the parties agreed that the entry into the defendant's home was made without a warrant, that the entry is presumptively unlawful and must be justified by exigent circumstances, and that the claimed exigent circumstances must be established by the government.

Six witnesses then testified at the hearing. The first witness was Michigan State Police Officer Douglas Tanner. Officer Tanner testified that he was assigned to the Gladwin Michigan State Police Post in September, 1999, that 911 emergency telephone service is available in the area, and that Michigan State Police practice is to investigate a 911 call terminated in a "hang-up" by an in-person visit by a police officer

to the location originating the call to ensure the safety of citizens.

On September 11, 1999 Mr. Tanner was dispatched with his partner, Michigan State Police Officer Gregory Hubers, to 670 M-18 Road in Gladwin. The dispatcher reported a 911 "hang-up call, possibly a domestic dispute." There was no testimony, however, that any conversation was conveyed by the caller to the dispatcher, nor any other basis for the conclusion that the call may have concerned a domestic dispute. Monica Allor later testified that she simply dialed 911 and hung up, not realizing that the phone even rang. No dispatch tapes or other report of the call were offered in evidence.

En route, Tanner was advised that the dispatcher tried without success to re-establish contact with the residence originating the call. Tanner stated that each 911 call is unique unto itself, and hang-ups can occur as a result of mis-dials, weather problems, or domestic disputes. In cases in which there is no problem being reported, Tanner says his usual practice is to check the residence and the occupants and then to leave.

Officers Tanner and Hubers initially drove to 650 M-18 Road because they could not see the house numbers along the road. They saw what appeared to be a party in progress, with parked motorcycles, an open garage, and several people inside the dwelling and outbuilding. Tanner and Hubers did not exit their vehicle, but eventually realized their mistake and drove next door to 670 M-18 Road. The driveway led to a mobile home, which is the residence of the defendant and Monica Allor.

Tanner and Hubers exited their police vehicle and Tanner went onto a wooden porch to knock on the front door. Some of the attendants at the party next door, including defendant's brothers and sister, walked over to the defendant's home. Hubers ordered these people to stay away from the house.

The defendant answered Tanner's knock on the door by opening the inner door and locking the

storm door; he asked Tanner what he wanted. Tanner testified that defendant appeared unsteady, had bloodshot eyes, and Tanner could smell the odor of intoxicants through the screen door as he spoke to him. The defendant offered evidence that his storm door had two panes of glass and no screen. Tanner acknowledged in later testimony that he did not remember if the outer door had a screen or glass panes.

The defendant told Tanner that he did not call 911 and that there was no need for the police to be there. Tanner asked if there was another person in the residence, and the defendant called toward the north end of the mobile home, which elicited a response from a female, eventually identified as Monica Allor. Tanner said that Allor came into view and sat on a couch in the room adjacent to the front door. She appeared to be crying and did not look at Tanner. She did not show any signs of injury, however; nor did the defendant. Allor did appear intoxicated. Tanner said that Allor did not acknowledge making the 911 call. Allor told Tanner that his presence at the premises was not needed.

Tanner asked the defendant to let him in the house to look around. The defendant vehemently declined, told Tanner he did not want him there, and said that he could take care of his own problems. The defendant became loud and profane, and asked Tanner if he had a search warrant. Tanner replied that he did not. Tanner then told the defendant to stand outside on the porch with Hubers. The defendant refused again. Finally, Tanner told the defendant to come out of the house or Tanner would arrest him. The defendant then unlocked the front door and Hubers pulled him outside.

Allor told Tanner not to come inside and that there was no one else in the house. Tanner entered the residence. Tanner noticed children's toys in the front room. He claimed to have seen a play pen in the south bedroom from his vantage point on the front porch. Allor was scantily clad and wanted to get a robe. Tanner followed her to the bedroom. Allor told Tanner that their son was with Allor's mother that

night. Tanner observed a telephone on the floor inside the house and a computer monitor pushed over on its front. Allor told Tanner that she had had a tantrum and made this mess herself.

Tanner searched the house for weapons and for other persons in need of aid. He testified that he did not accept the representation that there was no trouble at the residence, that he was concerned that there could be a flare-up after he left, and that he wanted to see if there was anyone else in the house who might need help. He found a rifle on the wall in the main bedroom and a derringer-style pistol on the closet shelf. He did not seize the weapons. He made no arrests. Tanner remained in the house for ten to fifteen minutes.

Tanner testified that a woman named Joyce entered the house while he was inside. She appeared to have a calming effect on Allor and sat on the couch with her.

Tanner subsequently reported his observations to a BATF agent.

Tanner had never been to this location previously, nor to the home next door. He had no prior contact with the defendant. Tanner had no information that any words were spoken during the 911 call. He did not have information that a crime had been committed.

Tanner did not recall if the lights were off when he approached the residence. There was no sound coming from the residence, and the home did not appear "unusual" in any way. As Tanner spoke with the defendant through the door, he did not observe any person in apparent danger. Nor did he observe any evidence of a crime having been committed. Tanner testified, however, that because there was a 911 hang-up call combined with several people who had come over from the party next door when the police showed up at 970 M-18 Road, the defendant's staunch refusal to consent to entry into his home by police, the defendant's denial of calling 911 or the existence of a problem, and his anger at the presence of the police,

Tanner felt a need to investigate to see if there was a person inside the residence in need of immediate aid.

Tanner acknowledged that he had no verification that there was a third person in the house, and he needed to investigate because he did not have any indication that there was an emergency involving any third person. He also acknowledged that the interior door had hinges on the south side, so that it swung open to the south, although Tanner did not recall if it blocked his view of the south bedroom when it swung open.

Finally, Tanner testified that it is his practice to check the residence regardless of whether the 911 call was accidental because he was aware of cases in which other officers had been found civilly liable when they did not check the residence and an injured party was on the premises. In this case, Tanner told the Court that he had found weapons on the premises, he believed the occupants were intoxicated, he suspected that a domestic assault had occurred although he did not have probable cause to make an arrest, he knew that there could have been a "flare-up," and yet he did not seize the weapons.

Officer Gary Hubers testified that he was Tanner's partner that evening. His primary responsibility was to back up Tanner. Hubers remained on the porch with the defendant while Tanner entered and searched the house. Hubers did not allow "Joyce" to enter the residence "on the heals" of Tanner, although she eventually did enter. Hubers observed the defendant that evening to be unsteady on his feet, he was loud, profane and slurred his speech, and he smelled of intoxicants. Allor also spoke to Tanner in a loud voice. Hubers never heard Allor acknowledge that she placed the 911 call. Hubers never observed an injury to any of the occupants of the premises. He testified that he did not have any reason to believe that someone else on the premises was injured.

The defendant called Monica Allor who testified that she was at her home at 970 South M-18 in

Gladwin on September 11, 1999 when the police came to the door. She learned that the police were coming when she observed the patrol car next door at the defendant's father's house. The defendant answered the door when the police knocked, and defendant called her to come to the door so the police officer could verify that she was not in distress.

Allor said she came to the front door, passed by the defendant, and looked at the police officer; she did not sit on the couch. She spoke to the police officer, told him no one else was in the house, and explained that her son was at his grandmother's house. The police officer asked to come in and she told him, "No." Allor said that she told Tanner that she had made the 911 call, but that she hung up and did not realize that the telephone had even rung.

Allor said that the storm door had two panes of glass and no screen. She also testified that a person standing on the front porch could not see into the south bedroom. She acknowledged that she was under the influence of alcohol that evening. She explained that earlier that evening she had been next door at the defendant's father's house for a pig roast to celebrate the up-coming wedding of Joyce Jacobs, defendant's sister. Allor drank four to five beers and had come home around 8:30 that night. She dialed 911 at about 10 p.m., and got ready for bed at 10:15 p.m.

Allor explained that she and the defendant had an argument that evening because Meixner did not pay attention to her on their night alone without their child. Allor repeatedly telephoned her mother, prompting the defendant to unplug the phone. Allor also admitted tipping over the computer monitor in the kitchen.

Joyce Ann Jacobs testified that she attended the party at her father's house at 950 M-18 Road on the afternoon and evening in question. She remembers a police vehicle in her father's driveway that

evening; it remained for 5 to10 minutes, then drove next door to her brother's house. Jacobs walked over to ask the officers why they were there. Both officers were on the porch at the time. Jacobs observed the conversation between Tanner and the defendant; the defendant was behind the glass storm door and Tanner was outside. Jacobs told Hubers that the baby was not home but was with his grandmother. Jacobs then saw Allor come to the door. Jacobs heard the defendant tell Tanner that the defendant did not want Tanner to enter. The defendant unlocked the door, Tanner opened it and Hubers pulled the defendant outside onto the porch. Tanner entered the house and Jacobs followed him in. Tanner went through the house using his flashlight to illuminate the rooms. Jacobs asked him to leave.

Jacobs did not hear any conversation between Tanner and Allor concerning the 911 call.

The defendant's brother, Carl Meixner, testified that he also attended the pig roast and walked over to the defendant's house when the police arrived, accompanied by his other two brothers and Joyce Jacobs. He spoke to one of the police officers who told the group to stay back or they would be arrested. Carl Meixner heard the defendant refuse Tanner permission to enter the house. Carl Meixner said that he was 60 feet from the house and could hear the conversation inside among defendant, Tanner and Allor. He heard no conversation about a 911 call.

The defendant, Thomas Meixner, testified in his own behalf. He had been back and forth between his house and his father's house that day since 2 p.m. He finally went home between 8:30 and 9 p.m. and started working on a vehicle transmission. He had an argument with Monica Allor but he did not learn that she had called 911 until after the arrival of the police. When Tanner came to the door, the defendant opened the wooden door and locked the storm door, and proceeded to tell Tanner in a loud voice that Tanner was not needed. At Tanner's request, the defendant called Allor, who came to the door. Neither

the defendant nor Allor was injured. Tanner insisted on entering the home, and the defendant demanded to see a warrant. Tanner pointed to his badge and said that it entitled him to do whatever he wanted to do. When the defendant unlocked the door, Hubers pulled him out onto the porch and Tanner entered the home.

The defendant admitted that he was loud and used profanity that evening. He opened the door to his house because he was told that he would be arrested if he refused. He acknowledged that Monica Allor was drunk that night. He admitted to unplugging the telephone, explaining that he had grown weary of Allor's calls to her mother. The defendant did not hear any conversation between Allor and Tanner concerning a 911 call.

II.

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

In *Payton v. New York*, 445 U.S. 573 (1980), the Supreme Court reasserted that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id.* at 585. Accordingly, to "minimize[] the danger of needless intrusions" into the "sanctity of the home," *id.* at 586, 601, the Fourth Amendment requires a warrant issued by a judicial officer – a "neutral and detached

magistrate." *Johnson v. United States*, 333 U.S. 10, 14 (1948).[1]

The Supreme Court has consistently held that only "reasonable" searches are allowed by the Fourth Amendment, and that searches without a warrant are "*per se* unreasonable" except in a few well-defined and carefully circumscribed instances. *Katz v. United States*, 389 U.S. 347, 357 (1967). In the case of a person's home, warrantless entries and searches are "presumptively unreasonable." *Payton v. New York, supra*, 445 U.S. at 586.

Although exigent circumstances – *i.e.*, the existence of an emergency situation demanding immediate action, *United States v. Radka*, 904 F.2d 357, 361 (6th Cir. 1990) – may excuse the failure to procure a search warrant, the government bears a "heavy burden" to demonstrate the exigency when attempting to overcome the illegality of a presumptively unreasonable search. *Welsh v. Wisconsin*, 466

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[1] In *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), Justice Jackson, writing for the Court, explained:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's home secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

(Footnotes omitted.)

U.S. 740, 750 (1984).

In *United States v. Radka, supra*, the Court of Appeals cataloged some of the exceptions to the warrant requirement recognized by the Supreme Court, including automobile searches, searches pursuant to consent, searches incident to a lawful arrest, seizures of objects in plain view, searches and seizures in pursuit of a fleeing felon, and seizures to prevent the loss or destruction of evidence. 904 F.2d at 360, fn. 3.

Another recognized exception to the warrant requirement centers around exigent circumstances in which the safety of the police or others within a home is in peril. *See, United States v. Johnson*, 22 F.3d 674, 680 (6th Cir. 1994). For instance, in *Minnesota v. Olson*, 495 U.S. 91 (1990), the Supreme Court endorsed the lower court's analysis of whether exigent circumstances existed in that case to justify the warrantless entry into a home that was surrounded by police in order to arrest a murder suspect who appeared to be preparing to flee. *Id.* at 100. The Court agreed that the "risk of danger to the police or to other persons inside or outside the dwelling" could constitute an exigent circumstance, but found that the exigency did not exist in that case. In *Mincey v. Arizona*, 437 U.S. 385 (1978), the Supreme Court rejected a general "murder scene" exception to the warrant requirement. However, the Court also stated that the police have a "right" to respond to "emergency situations," and that the "Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Id.* at 392.

The Court of Appeals for the Sixth Circuit has held that the government must establish an exception to the warrant requirement by "clear and positive proof." *United States v. Jones*, 641 F.2d 425, 429 (6th Cir. 1981) (consent search). Other courts have noted that the standard of proof in suppression hearings

is the preponderance of evidence standard. *See, Lego v. Twomey*, 404 U.S. 477, 488-489 (1972) (voluntariness of confession). *See also United States v. VanLewis*, 409 F. Supp. 535, 541 (E.D. Mich. 1976).

In all events, to satisfy its "heavy burden" to establish exigent circumstances, the government must do more than demonstrate "the mere possibility" that an exigency exists. *United States v. Radka, supra*, 904 F.2d at 362; *United States v. Jones, supra*, 641 F.2d at 428-429. The test is an objective one: the police officer must be able to point to "specific and articulable facts" at "the moment of the warrantless entry" that would lead a reasonable, experienced law enforcement officer to believe that someone inside the dwelling required immediate assistance. *See, United States v. Morgan*, 743 F.2d 1158, 1162, 1163 (6th Cir. 1984), *United States v. Arch*, 7 F.3d 1300, 1304 (7th Cir. 1993).

III.

An analysis of a claim that exigent circumstances justified a warrantless entry into a home is necessarily fact-specific. *United States v. Rohrig*, 98 F.3d 1506, 1519 (6th Cir. 1996). It is critical, therefore, to focus on the information that was reasonably available to Officers Tanner and Hubers on September 11, 1999. The first piece of information, and the fact which triggered this police-citizen encounter, was the 911 hang-up call. Although there does not appear to be a case decided in this circuit on the question of whether a 911 call can provide a sufficient basis to find exigent circumstances justifying a warrantless home entry, the issue has been addressed by the Seventh Circuit in *United States v. Richardson*, 208 F.3d 626 (7th Cir. 2000), on which the Magistrate Judge in this case placed heavy reliance. In *Richardson*, the Court concluded that the 911 emergency call in that case supported the Milwaukee police officers' reasonable belief that someone inside a home was in need of immediate

assistance, and therefore exigent circumstances justified the warrantless search of the premises. The Court noted that "911 calls *reporting an emergency* can be enough to support warrantless searches under the exigent circumstances exception, particularly where, as here, the caller identified himself." *Id.* at 630 (emphasis added). The 911 call in that case was placed by a man who identified himself by name and reported that a man named "Lucky" had raped and murdered a woman who could be found in the basement of the subject premises. Although the Milwaukee Police Department had received a previous 911 call reporting a murder at the same address one week earlier, the officers who responded to the scene did not know about the prior, false alarm. When the officers arrived at the scene, they saw the defendant in front of the house holding a dog on a chain. The police officers called for others in the house to come out, and another male complied with that command. The officers then searched the entire house and observed drugs and drug-packaging paraphernalia, but found no injured person or corpse.

In the case now before this Court, the 911 call conveyed *no* information. It was a hang-up call. There was no conversation at all, much less a report of an emergency. Certainly, the *possibility* of an emergency justified a limited response by the police, consisting of a personal trip to the premises to investigate. Likewise, the dispatcher's speculation that "possibly a domestic dispute" existed warranted a further look. Upon arrival, however, more was required to support a warrantless entry into the defendant's home.

Officer Tanner testified that when he arrived at the scene and encountered a belligerent and apparently intoxicated occupant, who refused to consent to a warrantless entry, his suspicion was heightened that a domestic assault had occurred. He was able to visualize and speak to the female on the premises without entering the house and confirm that she was not injured. He saw children's toys in the

livingroom, but that fact gives rise only to the objective *possibility* of the *presence* of a child, and sheds very little light on whether there was a person in the house in need of immediate assistance.

Although the defendant had a right to insist on his privacy and object to the intrusion into his home by the police, the Court does not condone his belligerent attitude and profane conduct. The defendant's behavior no doubt hardened the view of Officer Tanner, who was called upon to make an on-the-spot assessment of the situation. Officer Tanner was not "neutral and detached," nor could he be; he was, at the time, engaged in the "competitive enterprise of ferreting out crime." However, as noted by the Court in *Richardson*, Officer Tanner's subjective view of the situation is not controlling or even relevant; nor is his view that his badge provided the necessary and sufficient authority for a warrantless entry a correct statement of the law. Therefore, this Court must assess the objective facts as they should have reasonably appeared to Officer Tanner to determine whether exigent circumstances existed.

Officer Tanner testified that he suspected that a domestic assault had occurred, although he did not have sufficient objective facts to establish probable cause for that proposition. Officer Tanner testified that when the defendant came to the door, Tanner detected an odor of intoxicants. However, the evidence offered at the evidentiary hearing established that the storm door had two panes of glass and no screen and was closed at the time of the initial encounter, which suggests that Officer Tanner's memory of the details of the encounter may have been flawed.

The defendant acknowledged having drank beer earlier in the day. Officer Tanner testified that the defendant was unsteady on his feet and belligerent. Tanner stated that in cases of domestic assault, he is familiar that "flare-ups" can occur after officers leave the scene, and he claims to have been concerned of just such a possibility in this case. Yet Tanner has no explanation as to why he did not remove the firearms

from the scene when he found them there. The Court can only conclude that the objective circumstances did not appear as perilous to Officer Tanner as he attempted to describe them at the evidentiary hearing.

Officer Tanner testified at the evidentiary hearing that the person to whom he was attempting to offer "immediate assistance" was Monica Allor. However, even crediting Officer Tanner's testimony that Allor initially came to the livingroom, sat on the couch, and covered her face with her hands, those circumstances, as described by Officer Tanner, did not justify a warrantless entry into the premises. Monica Allor testified that she came to the door and spoke with Officer Tanner. Although this testimony was disputed, Officer Tanner acknowledged that Monica Allor did not otherwise appear injured when he observed her and spoke with her.

Finally, Officer Hubers, Tanner's partner, testified that he did not have any reason to believe that someone inside the house was injured or in need of immediate assistance.

In addition, Officer Tanner testified that whenever he responds to a 911 call, he "check[s] the residence out" regardless of whether the call is placed by accident or otherwise, because he has learned of other cases in which officers have been sued and found liable for failing to perform an adequate investigation. He testified that "it's my practice to check the entire residence so I'm satisfied that there are no persons there, irregardless [sic] of what the subjects at the scene state."

Despite Officer Tanner's subjective reaction to the defendant and his own personal concerns, the objective facts that existed were as follows: a 911 hang-up call was placed from the residence; no emergency was reported; further attempts to contact the residence were unsuccessful; a knock at the door aroused a belligerent occupant who refused to consent to a warrantless search of his home; and an intoxicated, upset and uninjured female was also present at the scene. Further, at the time Officer Tanner

made the entry, Monica Allor had not yet acknowledged placing the 911 call. The Court finds that these circumstances give rise, at most, to the mere *possibility* that there might have been someone else in the house, and no evidence that a person within was in need of immediate assistance. Despite Officer Tanner's desire to see for himself and possibly protect himself from suit, Officer Tanner needed objective facts to justify a "reasonabl[e] belie[f] that a person within [was] in need of immediate aid." *Mincey v. Arizona, supra*, 437 U.S. at 392.

Unlike the situation in *Richardson*, the 911 call in this case announced no emergency. It was a hang-up call which at most gave rise to the *possibility* of an emergency. When the officers arrived at the scene, they encountered denials from the occupants of the residence that an emergency existed. Of course, the officers were not obliged to take the word of the subjects that no mischief was afoot; yet without some positive indication to the contrary – some objective manifestation of the existence of an emergency situation demanding immediate action – the officers were not justified in physically intruding into the sanctity of the home. In other words, the police were entirely justified in discounting in its entirety the defendant's denial of an emergency; however, that left the officers, at most, with the absence of evidence, and although it did not establish the peace and tranquility of the household, likewise it did not prove the opposite possibility.

Officer Tanner testified that it is his policy to enter the home and conduct an investigation in every case in which he responds to a 911 call. Yet the Fourth Amendment commands that an intrusion into the sanctity of one's home be justified by more than personal practice or even department policy. It requires probable cause and either a warrant or exigent circumstances. Because neither existed here, the entry into and search of defendant's home on September 11, 1999 was unlawful.

IV.

Information obtained during Officer Tanner's illegal entry, specifically the presence of firearms in the residence, was conveyed to BATF Agent Jeffrey Maggard, who used it as the basis of an affidavit in support of his search warrant.[2] The firearms described in the indictment in this case were seized during the execution of the search warrant at defendant's home on September 16, 1999. Relying on *United States v. Leon*, 468 U.S. 897 (1984), the government contends that the evidence should not be suppressed because the agents who searched defendant's residence on September 16, 1999 relied in good faith on the validity of the search warrant.

In *United States v. Leon*, the Supreme Court held that the exclusionary rule should not bar the use of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a neutral judicial officer but which ultimately is found to be unsupported by probable cause. 468 U.S. at 900, 913. Search warrants can be invalidated for reasons other than a *post hoc* reassessment of a magistrate's probable cause decision. For instance, where a search warrant affidavit is tainted by illegally obtained information, the search warrant is invalid unless the untainted information contained in the affidavit establishes probable cause. *See, Murray v. United States*, 487 U.S. 533 (1988). Otherwise, the search warrant itself is the "fruit of the poisonous tree." *United States v. Nelson*, 459 F.2d 884, 889 (6th Cir. 1972), *quoting Wong Sun v. United States*, 371 U.S. 471 (1963).

The operative principle is stated in *Murray v. United States, supra*, as follows:

> The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, and of testimony concerning knowledge acquired during an unlawful

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[2]Agent Maggard had learned that the defendant had been convicted of the felony of carrying a concealed weapon in the Gladwin County, Michigan Circuit Court in 1993, which rendered his possession of firearms unlawful pursuant to 18 U.S.C. 922(g)(1).

> search. Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint.

487 U.S. at 536-537 (internal quotes and citations omitted).

In order to accept the government's argument in this case, one must conclude that the BATF agent's good faith alone "dissipate[d] the taint" of Officer Tanner's illegal entry. The government has not directed the Court's attention to any authority which supports such a notion. Rather, the Court of Appeals for the Sixth Circuit has recently stated that to avail itself of the independent source rule, "the government must show that the evidence was discovered through sources 'wholly independent of *any* constitutional violation.'" *United States v. Dice* 200 F.3d 978, 984 (6th Cir. 2000), quoting *United States v. Leake* 95 F.3d 409, 412 (6th Cir. 1996) (emphasis added). Indeed, it would be incongruous to allow the government to benefit from the illegality of another agent of the state. Otherwise, one government agent could insulate his misconduct simply by keeping his colleague ignorant of the facts. This would yield an unacceptable procedure. *See, United States v. DeLeon*, 979 F.2d 761 (9th Cir. 1992).

In this case, there is no source of information that the firearms were present in the defendant's home independent of the knowledge Officer Tanner acquired through the warrantless entry. As a consequence, the search warrant is rendered invalid.

V.

Officer Tanner's entry and search of the defendant's home on September 11, 1999, was not based on probable cause nor authorized by a warrant nor justified by exigent circumstances. The information thus obtained illegally could not be used to support the search warrant issued on September 16, 1999. The

evidence obtained pursuant to the search warrant must be suppressed. Therefore, the defendant's Motion to Suppress Evidence [dkt #9] is **GRANTED**.

/s/
DAVID M. LAWSON
UNITED STATES DISTRICT JUDGE

Dated: October 23, 2000

cc: Michael J. Hackett, Esq.
Janet Parker, Esq.
Magistrate Judge Binder